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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

GAIL SCHWARTZ,

Plaintiff and Respondent,

v.

CHARLES ALBERT PICCUTA et al.,

Defendants and Appellants.

H046153

(Santa Cruz County  
Super. Ct. No. 17CV02133)

In 2017, respondent Gail Schwartz filed a complaint against appellants Charles Albert Piccuta and the Piccuta Law Group, LLP<sup>1</sup> alleging causes of action for extortion, pain and suffering, and negligence. Appellants filed a special motion to strike Schwartz's complaint under Code of Civil Procedure section 425.16.<sup>2</sup> The trial court granted the motion as to Schwartz's causes of action for pain and suffering and negligence and denied the motion as to Schwartz's cause of action for extortion. The trial court also granted Schwartz leave to amend her complaint to allege a new cause of action for malicious prosecution.

Appellants argue that their special motion to strike should have been granted in its entirety and leave to amend should not have been granted. Appellants claim that the trial court erroneously concluded that Schwartz's cause of action for extortion arose out of a demand letter sent by appellants, and Schwartz did not demonstrate she had a probability

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<sup>1</sup> We refer to Charles Albert Piccuta as "Piccuta" and collectively refer to Piccuta and his law firm, Piccuta Law Group, LLC, as "appellants."

<sup>2</sup> Unspecified statutory references are to the Code of Civil Procedure.

of prevailing on a cause of action for malicious prosecution. We agree and reverse the trial court's order.

## **BACKGROUND**

### *1. The Truck Purchase*

In January 2014, Charles Tony Piccuta (Tony) purchased a truck from E&A Motorsports (E&A)<sup>3</sup> after seeing an advertisement on Craigslist. Respondent's son, Aaron Jay Schwartz (Aaron), was listed as E&A's owner on the DMV's occupational license status information system website. According to information on the DMV's website, E&A was located in Soquel, California.

To facilitate the truck purchase, Tony spoke to Brody Feuerhaken, who represented himself as E&A's authorized agent. According to Tony, Feuerhaken said that the truck was in good working order, the truck had only one previous owner, and the previous owner was a commercial entity that had performed regular maintenance on the truck. Tony further claimed that Feuerhaken said that there was someone else interested in purchasing the truck, and Feuerhaken would sell the truck to the next buyer if Tony passed on the opportunity. Relying on these representations, Tony purchased the truck from E&A in the amount of \$3,871.75.

Tony claimed that within two weeks of the purchase, the truck would no longer start, and Tony was required to make repairs. In the course of making repairs, Tony discovered that the truck had not been regularly maintained. In June 2015, the truck failed to start again, and Tony ordered a vehicle history report. According to the vehicle history report, the truck had multiple previous owners and had previously been stolen and recovered by the police. Tony contacted his father, Piccuta, who was an attorney. Piccuta agreed to represent Tony in pursuing a lawsuit against E&A for fraud.

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<sup>3</sup> E&A Motorsports is also referred to as "Eco and Alternative Motorsports" in the record. E&A was licensed by the California Department of Motor Vehicles (DMV) to sell used cars.

## *2. The Demand Letter and E&A's Response*

On July 8, 2015, Piccuta sent a letter to E&A Motorsports addressed to E&A and Aaron at the Soquel address listed on the DMV's website. In the letter, Piccuta wrote that he represented Tony, and he believed Feuerhaken made material misrepresentations to Tony about the "condition history and previous ownership of the [truck]," and, as a result, Tony "did not receive what was represented or what was bargained for."

The demand letter stated: "Attached are a DMV Investigation Complaint and a civil lawsuit detailing those misrepresentations. We are offering you the opportunity to resolve this matter before the attached are filed and submitted. The simplest solution would be to transfer title back to E & A and return the vehicle. In exchange, E & A would return the money paid for the vehicle as well as the amounts paid by my client for repairs made. Should we not hear from you by July 21st, 2015, we will file and submit the attached accordingly. Please advise how you wish to proceed."

Attached to the demand letter was a complaint that named Aaron and E&A as defendants and a completed DMV complaint form. The completed DMV complaint form stated that the vehicle history report showed that the truck had six previous owners, was reported stolen in 2005 and recovered by the police in 2006, was not regularly maintained by a single commercial owner, and was bought at an auto dealer auction for a quick resale. A printout of the vehicle history report, however, showed that the car had a *total* of six previous owners (including Tony), and that the car was stolen and recovered on the same day, January 22, 2006.

E&A responded to Piccuta's letter on July 17, 2015. The letterhead and the return address on the envelope bore the Soquel address listed on the DMV's website. In its letter, E&A said that Tony purchased the truck "as-is," and it was not willing to repurchase the truck from Tony. E&A asserted that it would not be intimidated by the lawsuit nor would it be "a victim of an attempted extortion." E&A further stated that it

was going to forward copies of Piccuta's demand letter and the complaint to the DMV investigator and the ethics division of the California State Bar.

3. *The Lawsuit Against E&A, Aaron, and Schwartz*

On November 6, 2015, Piccuta filed a complaint on Tony's behalf against Aaron, E&A, and multiple Doe defendants. The complaint alleged causes of action arising from E&A's sale of the truck to Tony, including declaratory relief (rescission of the contract), fraud, a violation of the Consumer Legal Remedies Act (Civ. Code, § 1770 et seq.), and a violation of Business and Professions Code section 17200.<sup>4</sup>

Several months later on March 27, 2016, Schwartz sent a letter to the trial court that was copied to Piccuta. In her letter, Schwartz stated that she had received the papers mailed to Aaron and E&A at the Soquel address, but Aaron and E&A did not receive the letter because Aaron was no longer at the Soquel address and had not been for several years. Thus, Schwartz asserted that neither Aaron nor E&A had been served. Schwartz claimed that she was the leaseholder of the Soquel address, but she was not an owner or agent of E&A and was not authorized to accept service of process. Schwartz said that she did not know Aaron's current address, but she believed he had moved out of California.

On May 19, 2016, Schwartz sent a letter to Piccuta. In her letter, Schwartz stated that she was a former attorney and had continued to monitor Tony's lawsuit against Aaron and E&A via the trial court's website. While she was monitoring Tony's lawsuit, she discovered that she had been recently added as a defendant.<sup>5</sup> Schwartz reiterated that she was the leaseholder of the Soquel address but was not an owner or agent of E&A. Schwartz further said that she had never worked for E&A. Schwartz expressed that she

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<sup>4</sup> The complaint alleged that Aaron and E&A violated Civil Code section 17200, but no such statute exists.

<sup>5</sup> The record on appeal does not contain a copy of the amended complaint substituting Schwartz for one of the Doe defendants in Tony's lawsuit.

was unsure why she was added to Tony's lawsuit and theorized that Piccuta may have mistakenly assumed that she was Aaron's spouse based on their shared last name.

Schwartz explained that she was Aaron's mother, and she was not liable for Aaron's debts because he was over 18 years old. Schwartz expressed that she expected that her name be withdrawn from Tony's complaint within the next 10 days, and if her name was not withdrawn she would pursue "further legal actions" against Tony.

On September 13, 2016, a default judgment was entered against E&A in the amount of \$7,027.64. Tony voluntarily requested that Aaron and Schwartz be dismissed, and the trial court dismissed both of them without prejudice.

#### 4. *Schwartz's Lawsuit Against Appellants*

On October 6, 2016, Schwartz sent a letter to Piccuta. In her letter, Schwartz stated that she had continued to monitor the case and had discovered that an action had been taken by the trial court on September 13, 2016. Schwartz went to the trial court clerk's office and obtained a copy of the minute order dismissing her as a defendant. Schwartz, however, asserted that Piccuta had never communicated with her or notified her about the dismissal. Schwartz claimed that she had accepted a position as a legal consultant in Washington, but she had lost the two-year contract when she notified her future employer that she had been added as a defendant in Tony's lawsuit. Schwartz claimed that the position would have paid her \$79,000 a year. Since she lost the employment contract as a direct result of Tony's lawsuit, Schwartz requested that Piccuta pay her the total value of her contract (\$158,000).

On August 21, 2017, Schwartz filed a complaint against appellants, Piccuta and his law firm, Piccuta Law Group, LLC, alleging causes of action for extortion, pain and suffering, and negligence. Her complaint alleged that Piccuta wrote a demand letter to E&A and Aaron and attached to the letter was a complaint to be filed with the DMV and a copy of a complaint to be filed with the trial court. She further alleged that after

appellants filed their lawsuit, she wrote to the trial court to inform the court that the complaint had not been properly served. Appellants were given a copy of her letter. She also alleged that after she was added to the complaint as a defendant, she wrote to Piccuta and advised him that she was not an owner, employee, or agent of E&A; she was merely Aaron's mother and was not liable for his debts.

For her cause of action for extortion, Schwartz alleged: "Defendant [Piccuta], by adding Plaintiff [Schwartz] to the verified complaint, committed a violation of California Penal Code Section 518 PC and 523 PC against the Plaintiff in Santa Cruz County Superior Court." Schwartz further alleged: "Defendant [Piccuta], as a licensed California attorney, violated the California Rules of Professional Conduct, rule 5-100(A), which states: [¶] 'A member shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute.' [¶] Defendant prepared a complaint to DMV which he stated in his demand letter that he file [sic] if Plaintiff did not pay for his client's vehicle and alleged repairs. He at no time provided proof of said repairs nor did he offer such proof at any time." Schwartz claimed that to the best of her knowledge, Piccuta "has been paid the money he requested and also has retained possession/ownership of the vehicle." Attached to the complaint was the demand letter sent by Piccuta to E&A and Aaron, which requested that E&A return the money paid for the vehicle as well as the amounts spent by Tony for repairs.

For her cause of action for pain and suffering, Schwartz alleged that appellants' actions caused her pain, suffering, and emotional distress. Schwartz claimed that appellants filed a "relatively minor" action with the trial court instead of with the small claims court. Thus, Schwartz asserted that Piccuta used his position as an attorney to intimidate her, and appellants never responded to any of Schwartz's letters even after they voluntarily dismissed her from the complaint.

For her cause of action for negligence, Schwartz alleged that Piccuta breached his duty of care by not conducting a diligent investigation into the facts before adding Schwartz to Tony's complaint. Schwartz asserted that she sent a letter to Piccuta, informing him that proper service had not been effectuated and that she was not legally responsible for Aaron or E&A, but Piccuta ignored her letter and filed a proof of service with the trial court. Schwartz claimed that she lost her work contract as a direct result of appellants' failure to respond to her letters or to dismiss her from the lawsuit, causing her to lose \$158,000 of total promised income.

#### *5. Appellants' Special Motion to Strike*

On May 23, 2018, appellants filed a special motion to strike Schwartz's complaint under the anti-SLAPP statute (§ 425.16). Appellants claimed that Schwartz was added as a defendant to Tony's lawsuit after they suspected that Schwartz was assisting her son, Aaron, evade service of process. Their suspicions arose from Schwartz's March 27, 2016 letter that claimed that Aaron was not at the Soquel address and had not been there for several years. Appellants believed Schwartz was lying because E&A had responded to appellants' demand letter on July 17, 2015, and appellants' demand letter had been mailed to the Soquel address—the same address that Schwartz claimed that Aaron had vacated for several years. After examining E&A's letter responding to appellants' demand letter and the letter sent by Schwartz, appellants concluded that the letters used similar language and were both likely written by Schwartz. Appellants investigated Schwartz's personal history and discovered that she was a disbarred attorney from Washington State. Given the circumstances, appellants believed it would be prudent to name Schwartz as a defendant in Tony's lawsuit and substituted Schwartz for one of the Doe defendants named in the complaint. After the substitution was made, Schwartz, Aaron, and E&A were codefendants in Tony's lawsuit.

Appellants attempted to serve Schwartz with the complaint at the only address that they could find that was associated with her, but their service attempt was unsuccessful. Before Schwartz or Aaron could be served, the trial court entered a default judgment against E&A. As a result, appellants decided to dismiss both Schwartz and Aaron from the lawsuit without prejudice. Appellants believed that Schwartz and Aaron were “evasive charlatans” that would be difficult to find, let alone collect a judgment from, making it efficient to simply terminate the litigation against them. Moreover, appellants already expected a payment from E&A because E&A was required to maintain a bond as a used car dealer registered with the State of California.

Appellants argued that Schwartz’s causes of action were based on appellants’ act of adding Schwartz to Tony’s lawsuit against E&A and Aaron. Thus, appellants insisted that the entirety of Schwartz’s complaint was based on protected activity under the anti-SLAPP statute.

Appellants further argued that Schwartz could not demonstrate a probability of prevailing on the merits of her claims. Appellants maintained that Schwartz’s extortion claim was meritless because adding a person to a civil lawsuit in good faith was not extortion and the litigation privilege (Civ. Code, § 47, subd. (b)) extends to appellants’ actions. Appellants also noted that the DMV complaint referenced by Schwartz in her complaint was addressed to Aaron and E&A Motorsports, not Schwartz. As a result, appellants insisted that the DMV complaint had no bearing on Schwartz’s extortion claim.

Next, appellants contended that “pain and suffering” was an element of damages and not a separate cause of action, so Schwartz’s cause of action for pain and suffering failed as a matter of law. Appellants further argued that to the extent that her cause of action could be construed as a cause of action for intentional infliction of emotional distress, she failed to plead extreme or outrageous conduct. According to appellants,

Schwartz also failed to plead sufficient facts to establish a cause of action for negligent infliction of emotional distress.

Lastly, appellants argued that the litigation privilege extended to Schwartz's cause of action for negligence because it was premised on appellants' decision to add her to Tony's lawsuit.

Schwartz opposed appellants' anti-SLAPP motion. Schwartz claimed that appellants had the right to sue Aaron and E&A, but they did not have the right to "knowingly add [Schwartz] to the suit." Thus, Schwartz insisted that the anti-SLAPP statute did not apply. She noted that Piccuta "attempted to use his position to intimidate and possible [*sic*] extort money from the business owner [of E&A]" when he sent the demand letter. Schwartz further argued that her son Aaron was the business owner, and, since he was already an adult, she was not liable for his "bills or actions." Yet, appellants still added her to Tony's lawsuit. Schwartz contended that she was "not an owner, not an employee, not even an agent for process of service [*sic*]." Arguing that she could show a probability of prevailing on her extortion claim, Schwartz again claimed that she "was a victim of extortion as a direct result of the Defendant [appellants] knowingly adding her to the previous suit."

Schwartz attached a declaration prepared by Feuerhaken, the agent of E&A that sold Tony the used truck. Feuerhaken asserted that he never told Tony that the truck only had one previous owner or that the truck was regularly maintained. Schwartz also attached a printout of a news article describing the recent audit of the California State Bar and a letter from the California State Bar summarizing its decision to close Schwartz's complaint about Piccuta and denying Schwartz's request for reconsideration of the

decision to close her complaint.<sup>6</sup> Schwartz also attached a copy of an article from the Rutgers Journal of Law & Public Policy discussing the overuse of anti-SLAPP motions.

#### 6. *The Trial Court's Order*

After hearing oral argument from the parties, the trial court issued an order denying appellants' anti-SLAPP motion as to Schwartz's cause of action for extortion and granting the motion as to Schwartz's causes of action for pain and suffering and negligence.<sup>7</sup> The trial court further granted Schwartz leave to amend her complaint to state a cause of action for malicious prosecution.

In its order, the trial court observed that Schwartz's cause of action for extortion was based on appellants' demand letter requesting the return of the purchase price of the truck and the cost of repairs. Attached to the demand letter was a completed DMV complaint form that contained several false statements: the truck had six previous owners (the vehicle history report reflected five owners) and the car had been stolen in 2005 and recovered in 2006 (the vehicle history report showed that it was stolen and returned on the same day). Citing the California State Bar Rules of Professional Conduct, rule 5-100A, which prohibits attorneys from threatening the pursuit of criminal, administrative, or disciplinary charges to gain an advantage in a civil dispute, the trial court determined that it was undisputed that appellants' demand letter threatened filing the administrative complaint if the settlement demands were not met. Thus, the trial court determined that the demand letter was extortion as a matter of law, and, as a result, the demand letter was not protected petitioning activity under the anti-SLAPP statute.

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<sup>6</sup> In its letter, the California State Bar stated that no further investigation was needed into Schwartz's allegation that Piccuta added her as a party to a civil lawsuit without probable cause and with the intent to harass or cause malicious injury to her.

<sup>7</sup> Appellants elected to proceed without a reporter's transcript, so the transcript of the hearing is not a part of the record on appeal.

In contrast, the trial court determined that the causes of action for pain and suffering and negligence arose from appellants' addition of Schwartz to Tony's complaint, which constituted protected activity, and Schwartz did not demonstrate a probability of prevailing on the merits of her claims. The trial court further determined that the pain and suffering cause of action was not a valid cause of action. Moreover, the pain and suffering and the negligence claims were both barred by the litigation privilege under Civil Code section 47, subdivision (b). The trial court, however, held that based on the evidence submitted by the parties, it appeared that Schwartz may have a probability of prevailing on a malicious prosecution claim, which would not be barred by the litigation privilege.

In its order, the trial court acknowledged that appellants argued at oral argument that the demand letter was not intended for Schwartz so she could not claim to be extorted by it. The trial court rejected this argument, noting that appellants added Schwartz as a defendant in Tony's lawsuit and argued that she was liable as an agent of the other defendants. Thus, the trial court theorized that Schwartz could arguably be harmed by the threatened DMV complaint. The court further reasoned: "[T]he demand letter was not protected speech. Thus, the burden never shift[ed] to the plaintiff to show a likelihood of prevailing on the merits in the context of the analysis of a motion to strike. Whether the defendant's letter was directed to the plaintiff raises the question of whether the plaintiff will prevail on the merits." The trial court then expressly declined to reach the question of whether Schwartz had a probability of prevailing on the merits of her extortion claim.

### **DISCUSSION**

Appellants argue that the trial court erroneously denied their anti-SLAPP motion as to Schwartz's cause of action for extortion. Appellants further argue that the trial court erred when it granted Schwartz leave to amend her complaint to allege a new cause of

action for malicious prosecution. As we explain below, we agree with appellants' arguments and reverse the trial court's order.

1. *Overview of the Anti-SLAPP Statute and the Standard of Review*<sup>8</sup>

"SLAPP is an acronym for 'strategic lawsuits against public participation.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) The anti-SLAPP statute provides a "procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) Consequently, "the anti-SLAPP statute is to be construed broadly." (*Padres L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 508.)

In evaluating an anti-SLAPP motion, the trial court must engage in a two-step process. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) It first determines "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) A defendant meets this burden by demonstrating the plaintiff's action is premised on statements or conduct taken " 'in furtherance of the [defendant]'s right of petition or free speech under the United States [Constitution] or [the] California Constitution in connection with a public issue,' as defined in the [anti-SLAPP] statute. (§ 425.16, subd. (b)(1).)" (*Equilon, supra*, at p. 67.)

To determine if a cause of action arises from protected activity, "we must 'consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.' [Citation.] We must distinguish 'between activities that form the basis for a claim and those that merely lead

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<sup>8</sup> In her respondent's brief, Schwartz argues that appellants' anti-SLAPP motion was untimely filed. Schwartz did not object to the timeliness of the anti-SLAPP motion during the proceedings below. As a result, the issue has not been preserved on appeal. (See *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1 [reviewing court will not consider procedural defects that could have been but were not presented to the trial court].)

to the liability-creating activity or provide evidentiary support for the claim.’ ” (*Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 771, quoting *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063, 1064 (*Park*).) “In deciding whether the ‘arising from’ requirement is met, a court considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ ” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

Once the defendant makes the requisite showing that a cause of action is based on protected activity, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (*Equilon, supra*, 29 Cal.4th at p. 67.) “Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Navellier, supra*, 29 Cal.4th at p. 89.)

We review the trial court’s ruling on an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*).) In so doing, we consider “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b)(2).) We do not make credibility determinations or compare the weight of the evidence presented below. Instead, we accept the opposing party’s evidence as true and evaluate the moving party’s evidence only to determine if it has defeated the opposing party’s evidence as a matter of law. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) The court “should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, superseded in part by statute on other grounds as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 547-548.)

## 2. *Schwartz's Cause of Action for Extortion*

### a. **Arising From Protected Activity**

Appellants argue that Schwartz's cause of action for civil extortion arose from appellants' addition of Schwartz as a defendant in Tony's lawsuit. Thus, appellants insist that they satisfied the first prong of the anti-SLAPP statute because adding Schwartz to the lawsuit was protected activity.

In *Flatley*, the California Supreme Court described the crime of extortion as follows: “ ‘Extortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear . . .’ (Pen. Code, § 518.) Fear, for purposes of extortion ‘may be induced by a threat, either: [¶] . . . [¶] 2. To accuse the individual threatened . . . of any crime; or, [¶] 3. To expose, or impute to him . . . any deformity, disgrace or crime[.]’ (Pen. Code, § 519.)” (*Flatley, supra*, 39 Cal.4th at p. 326.)

We agree with appellants that Schwartz's cause of action for extortion arises from appellants' addition of her name to Tony's lawsuit. Schwartz's complaint alleged that “[appellants], by adding [Schwartz] to the verified complaint, committed a violation of California Penal Code section 518 PC and 523 PC against [Schwartz].” Penal Code section 518 defines the crime of extortion. Penal Code section 523 describes the punishment for defendants who write threatening letters or introduce ransomware to a computer or computer system.

Schwartz argues that adding her to the lawsuit is not protected activity because she was “substituted” into the complaint, “subjecting her to all of the alleged debts of the previous case.” Thus, she claims that adding her name to the lawsuit was not protected activity. Schwartz's claim has no merit. Adding Schwartz to Tony's complaint was an act made in connection with a civil litigation and therefore falls within the purview of the anti-SLAPP statute. (See *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908 [statements made in connection with or preparation of litigation are protected activity

under anti-SLAPP statute]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [statements made in preparation of or in anticipation of bringing an action are protected activity under anti-SLAPP statute]; *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35 [statements, writings, and pleadings in connection with civil litigation are covered by anti-SLAPP statute].) As a result, Schwartz's cause of action for extortion arises from protected activity.

The trial court, however, concluded that the anti-SLAPP statute did not apply to Schwartz's cause of action for civil extortion because the cause of action was based solely on the demand letter that Piccuta sent to Aaron and E&A. The trial court then determined that the demand letter constituted extortion as a matter of law and was not protected activity. Based on our independent review of Schwartz's complaint, we determine that this conclusion was incorrect.

To determine which acts give rise to Schwartz's extortion cause of action, we must look to her complaint. "[T]he issues in an anti-SLAPP motion are framed by the pleadings." (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 672.) Schwartz included several allegations under her cause of action for extortion. The first allegation, as we have discussed, was that appellants "committed a violation of California Penal Code Section 518 PC and 523 PC against" Schwartz when they added her name to Tony's lawsuit.

The second allegation under Schwartz's cause of action for extortion was that "[Piccuta], as a licensed California attorney, violated the California Rules of Professional Conduct, rule 5-100(A), which states: [¶] 'A member shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute.' [¶] Defendant prepared a complaint to DMV which he stated in his demand letter that he file [*sic*] if *Plaintiff* did not pay for his client's vehicle and alleged repairs. He at no time provided proof of said repairs nor did he offer such proof at any time." (Italics added.)

It appears that Schwartz inadvertently refers to herself (the plaintiff) in this allegation. Schwartz attached the demand letter sent by Piccuta to her complaint, and the demand letter requested that E&A, not Schwartz, pay for Tony's vehicle and alleged repairs. Schwartz's complaint does not allege she was associated with E&A, or that the letter was somehow directed to her.

In its ruling, it appears that the trial court inadvertently interpreted Schwartz's allegation about the demand letter as an allegation that the demand letter constituted extortion toward her. When determining whether a cause of action arises from protected activity, we must distinguish "between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Park, supra*, 2 Cal.5th at p. 1064.) We must "consider the elements of the challenged claim and what actions by the defendant[s] supply those elements and consequently form the basis for liability." (*Id.* at p. 1063.)

The elements of extortion require that a defendant obtain property from another using force or fear. (See *Flatley, supra*, 39 Cal.4th at p. 326.) The allegation that Piccuta sent a demand letter to Aaron and E&A, which Schwartz claimed violated the Rules of Professional Conduct, did not form the basis for appellants' liability to Schwartz under her extortion claim.<sup>9</sup> The allegation that Piccuta sent a demand letter merely provided evidentiary support for her claim that appellants knowingly extorted her by adding her as a defendant in Tony's lawsuit.

Our interpretation is consistent with Schwartz's own arguments below to the trial court. In her opposition to the anti-SLAPP motion, Schwartz argued that the anti-SLAPP

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<sup>9</sup> In its order, the trial court concluded that "[w]hether the defendant's letter was directed to the plaintiff raises the question of whether the plaintiff will prevail on the merits." The trial court, however, failed to consider whether the demand letter gave rise to Schwartz's cause of action. Whether the demand letter constituted extortion *to Schwartz* should be considered when making the initial determination of whether the extortion cause of action arises from protected petitioning activity.

statute did not apply because appellants did not have the right to “knowingly add [Schwartz] to the suit.” She also argued that she “was a victim of extortion as a direct result of the Defendant [appellants] knowingly adding her to the previous suit.” Schwartz acknowledged the demand letter in her opposition to appellants’ anti-SLAPP motion, but she did so only when she argued that Piccuta “attempted to use his position to intimidate and possible [*sic*] extort money from the *business owner* [of E&A].” (Italics added.) Schwartz maintained below that Aaron was E&A’s business owner, and, since Aaron was already an adult, she was not liable for his “bills or actions.”

Unsurprisingly, Schwartz now argues on appeal that the trial court correctly found that the demand letter constituted extortion toward her and correctly determined that the demand letter was extortion as a matter of law under the standard set forth in *Flatley*, *supra*, 39 Cal.4th 299.<sup>10</sup> Schwartz again focuses on appellants’ decision to “substitute” her as a defendant, an act that she claims is distinct from merely being added as a defendant to a lawsuit. She argues that the demand letter could support her cause of action for extortion because the demand letter, though addressed to Aaron and E&A, also “belonged” to her and subjected her to any alleged debt.

Schwartz, however, did not argue below that appellants’ “substitution” of her as a defendant in Tony’s lawsuit placed her on equal footing with E&A and Aaron with respect to the demand letter, and arguments not presented below are typically not considered on appeal. (See *Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1401 [litigants must adhere to the theory on which a case was tried and may not change his or her position on appeal and assert a new theory].) Moreover, as we have

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<sup>10</sup> As stated, Schwartz’s cause of action for extortion did not arise from the filing of the demand letter to Aaron and E&A. As a result, Schwartz’s opposition to appellants’ anti-SLAPP motion and appellants’ reply did *not* contain any argument or analysis into whether the demand letter constituted extortion as a matter of law. It appears that the trial court considered this argument on its own.

explained, Schwartz's complaint and her arguments below reaffirmed that she alleged that appellants extorted her when they added her as a defendant, not when they sent a demand letter to Aaron and E&A. And nowhere in her complaint does she allege that she was "substituted" into the complaint; she alleged that she was "added" to the complaint.

In sum, we conclude that Schwartz's cause of action for extortion arose from appellants' act of adding her as a defendant in Tony's lawsuit. Since this act was protected petitioning activity under section 425.16, the trial court erred when it determined that this cause of action fell outside the purview of the anti-SLAPP statute.

**b. Schwartz Has Not Demonstrated a Probability of Prevailing on the Merits**

Below, the trial court concluded that appellants did not meet their initial burden to demonstrate that Schwartz's cause of action for extortion arose from protected petitioning activity. As a result, the trial court did not reach the second prong of the anti-SLAPP analysis and did not determine whether Schwartz met her burden to demonstrate there is a probability she could prevail on the merits of her claim.

As appellants note, when a trial court fails to reach the second-prong analysis when considering an anti-SLAPP motion because it erroneously ruled against a plaintiff on the first prong, as the reviewing court we may either remand the matter to the trial court (see *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 286) or decide the issue ourselves (see *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 615-616). Here, the record is sufficient for us to make a determination on whether Schwartz met her burden on the second prong, so we proceed to analyze the argument on our own.

Appellants argue that Schwartz cannot demonstrate a probability of prevailing on the merits of her claim because adding Schwartz as a defendant in Tony's lawsuit is covered by the litigation privilege (Civ. Code, § 47, subd. (b)).

"The litigation privilege is 'relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a

probability of prevailing.’ ” (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1485.) “ ‘The litigation privilege, codified at Civil Code section 47, subdivision (b), provides that a “publication or broadcast” made as part of a “judicial proceeding” is privileged. This privilege is absolute in nature, applying “to *all* publications, irrespective of their maliciousness.” [Citation.] “The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.” ’ ” (*Ibid.*)

We agree with appellants that the litigation privilege applies. Adding Schwartz as a defendant was a statement made in a judicial proceeding. It was made by appellants, who represented Tony in his lawsuit, and was done in furtherance of Tony’s lawsuit and was logically related to the underlying action. Because the litigation privilege precludes liability based on appellants’ act, Schwartz is not able to demonstrate that she has a probability of prevailing on her claim. (See *Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1302 [plaintiff cannot establish probability of prevailing when litigation privilege precludes liability].)

In view of our conclusion that Schwartz’s cause of action for extortion arose from protected activity and Schwartz does not have a probability of prevailing on the merits of her claim, we conclude that the trial court’s order denying the anti-SLAPP motion as to this cause of action was erroneous.

### 3. *Leave to Amend Complaint*

Below, the trial court granted appellants’ anti-SLAPP motion as to Schwartz’s causes of action for pain and suffering and negligence. The trial court, however, granted Schwartz leave to amend her complaint to allege a new cause of action for malicious

prosecution. Appellants argue the trial court's decision to permit Schwartz to amend her complaint was an abuse of discretion.

“[S]ection 425.16 provides no mechanism for granting anti-SLAPP motions *with leave to amend*.” (*Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 629.) Appellate courts, however, have held that trial courts have the discretionary authority to permit plaintiffs to amend complaints after an anti-SLAPP motion is filed in certain limited circumstances. (*Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 873 (*Nguyen-Lam*).) Generally, if a trial court has the discretionary power to decide an issue, we will not reverse the trial court's exercise of discretion absent a clear showing of abuse. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) “It is an abuse of discretion for a trial court to misinterpret or misapply the law.” (*Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1334.)

Appellate courts have recognized that permitting leave to amend may frustrate the purposes of the anti-SLAPP statute. In *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068 (*Simmons*), the plaintiff argued that the trial court should have granted him leave to amend his complaint to remove any allegations that may be “ ‘objectionable’ ” under section 425.16. (*Simmons, supra*, at p. 1073.) The Third Appellate District rejected the plaintiff's argument after observing that the anti-SLAPP statute does not have a provision for amending a complaint once a trial court determines there is a connection to protected activity. (*Id.* at pp. 1073-1074.) The appellate court concluded that “[a]llowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second

round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend. [¶] By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent.” (*Ibid.*)

Leave to amend, however, may be properly granted in certain situations. In *Nguyen-Lam, supra*, 171 Cal.App.4th 858, the Fourth Appellate District concluded that the trial court did not err when it permitted the plaintiff to amend her complaint after determining that she had a probability of prevailing on her cause of action for defamation. (*Id.* at p. 862.) The plaintiff had failed to plead actual malice in her original complaint, but the evidence submitted in connection with the motion to strike was sufficient to establish actual malice. (*Ibid.*) *Nguyen-Lam* distinguished *Simmons* and noted that unlike the *Simmons* plaintiff, the proposed amendment before the trial court would not “attempt to void [the] defendant’s showing on the first prong of the anti-SLAPP inquiry.” (*Id.* at p. 870.) The appellate court further explained that its decision was also based on the fact that the “plaintiff’s amendment had nothing to do with [the] defendant’s assertion his statements were made in connection with his right of petition or free speech. Rather, assuming that showing had been made, and in conjunction with her burden on the second prong to show a probability of prevailing on the merits, [the] plaintiff sought to amend the complaint to plead specifically that [the] defendant harbored the requisite actual malice as shown by the evidence presented for the hearing on the strike motion.” (*Id.* at pp. 870-871.)

*Nguyen-Lam* determined that because the plaintiff demonstrated a probability of prevailing at trial if she could amend her complaint to include malice, “ ‘[d]isallowing an amendment would permit [the] defendant to gain an undeserved victory, undeserved because it was not what the Legislature intended when it enacted the anti-SLAPP statute.’ ” (*Nguyen-Lam, supra*, 171 Cal.App.4th at p. 873.) The appellate court then

concluded that when “the strike opponent has demonstrated the requisite probability of success in showing such malice, as here, her complaint falls outside the purpose of the anti-SLAPP statute—indeed, it is not a SLAPP suit at all. Simply put, the Legislature did not intend to shield statements shown to be malicious with an unwritten bar on amendment in the circumstances here. Consequently, the trial court did not err in permitting [the] plaintiff to amend her complaint to plead actual malice in conformity with the proof presented at the hearing on the strike motion.” (*Ibid.*)

The exception articulated in *Nguyen-Lam* is inapplicable here for two reasons. First, the *Nguyen-Lam* plaintiff sought to amend her complaint to plead a necessary element (malice) of cause of action that was already pleaded (defamation). (*Nguyen-Lam, supra*, 171 Cal.App.4th at p. 862.) Here, Schwartz was granted leave to amend an entirely new cause of action. Appellate courts have concluded that it is not appropriate to permit plaintiff’s to amend their complaint to plead entirely new causes of action, especially when there was nothing prohibiting the plaintiff from pleading the cause of action at the outset. (See *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 772 [plaintiff’s should not be permitted to plead new cause of action for malicious prosecution when nothing prohibited plaintiff’s from timely alleging the cause of action before].)

Second, the *Nguyen-Lam* plaintiff demonstrated a probability of prevailing on the merits based on the evidence that had already been submitted in connection with the anti-SLAPP motion. (*Nguyen-Lam, supra*, 171 Cal.App.4th at p. 862.) Schwartz, however, did not demonstrate she had a probability of prevailing on a malicious prosecution claim.

To prevail on a claim of malicious prosecution, Schwartz was required to show that Tony’s complaint was (1) initiated by or at the direction of the party that is the defendant in the malicious prosecution action, (2) legally terminated in Schwartz’s favor,

(3) initiated without probable cause, and (4) initiated with malice. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740.) Schwartz does not present evidence to establish the second element of a malicious prosecution action—that the lawsuit was terminated in her favor.

According to the trial court’s minute order, Schwartz was voluntarily dismissed without prejudice from Tony’s lawsuit after a default was entered against E&A. “ ‘A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citations.] ‘It is not enough, however, merely to show that the proceeding was dismissed.’ [Citation.] The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits.’ [Citations.] A voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim.” (*Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 893-894.) Other examples of voluntary dismissals that are not a termination in a defendant’s favor include dismissals when: it would be too costly to litigate (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1057), the case was brought prematurely (*Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1856), or the dismissal was made pursuant to a settlement (*Dalany v. American Pacific Holding Corp.* (1996) 42 Cal.App.4th 822, 828-829).

In support of their anti-SLAPP motion, appellants provided evidence that they voluntarily dismissed Schwartz because they did not want to spend additional time and resources on locating her and serving her with the lawsuit. In his declaration, Piccuta asserted that the default judgment against E&A was entered before appellants had the opportunity to serve Schwartz. At that point, appellants had already unsuccessfully attempted to serve Schwartz. Thus, Piccuta believed that it would be more efficient to end the litigation against Schwartz because it would be difficult to locate her and to

collect a judgment against her. Moreover, appellants already expected a payment from E&A because E&A was required to maintain a bond as a used car dealer registered with the State of California. Attached to the declaration was an affidavit prepared by a process server. According to the affidavit, the process server had attempted to serve Schwartz at an address in Soquel.

Schwartz, however, did not submit any evidence about the circumstances of the voluntary dismissal that would prove that the voluntary dismissal was a favorable termination on the merits. (See *Wilson v. Parker, Covert & Chidester*, *supra*, 28 Cal.4th at p. 821 [plaintiff must demonstrate that complaint is legally sufficient and supported by a sufficient prima facie showing of facts to establish probability of prevailing].)

Since Schwartz failed to make a sufficient evidentiary showing that she could succeed on the merits of a malicious prosecution claim, the trial court abused its discretion when it granted her leave to amend her complaint. Unlike the circumstances presented in *Nguyen-Lam*, the proposed amendment was not based on evidence before the trial court that demonstrated that the amendment had a probability of being successful. (*Nguyen-Lam*, *supra*, 171 Cal.App.4th at pp. 870-871.) As a result, there was no basis for the trial court to permit Schwartz to amend her complaint. (See *Simmons*, *supra*, 92 Cal.App.4th at pp. 1073-1074 [permitting SLAPP plaintiff to amend complaint once prima facie showing of protected activity has been met would undermine purpose of anti-SLAPP statute].)

#### 4. Attorney Fees

A prevailing defendant on an anti-SLAPP motion is entitled to recover attorney fees under section 425.16, subdivision (c). Appellants have prevailed on their anti-SLAPP motion. Therefore, on remand the trial court should consider and rule on any motion for attorney fees filed by appellants.

### **DISPOSITION**

The trial court's order granting in part and denying in part appellants' special motion to strike is reversed. On remand, the trial court is directed to enter a new order granting appellants' anti-SLAPP motion in its entirety and striking the order granting respondent leave to amend her complaint to state a cause of action for malicious prosecution. The trial court must also consider and rule on any attorney fees motions brought by appellants under Code of Civil Procedure section 425.16, subdivision (c). Appellants are entitled to their costs on appeal.

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Premo, J.

WE CONCUR:

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Greenwood, P.J.

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Elia, J.